YONG SIEW CHOON

v.

KERAJAAN MALAYSIA

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ALAUDDIN MOHD SHERIFF JCA
MOHD GHAZALI MOHD YUSOFF JCA
[CIVIL APPEAL NO: W-01-150-1998]
27 JANUARY 2003

CIVIL PROCEDURE: *Action - Proceedings against estate - No letters of representation extracted - Whether action could be commenced against deceased's estate - Whether plaintiff complied with O. 15 r. 6A(4) Rules of the High Court 1980 - Whether plaintiff's action an illegality and a nullity - Action by government against deceased's representative for recovery of income tax*

REVENUE LAW: *Income Tax - Recovery against deceased's estate - Action by government against deceased's representative - No letters of representation extracted - Whether action could be commenced against deceased's estate - Whether government complied with O. 15 r. 6A(4) Rules of the High Court 1980 - Whether government's action an illegality and a nullity*

The Government ('the plaintiff') commenced an action against the estate of one Abdul Hamid bin Tun Azmi ('the deceased') for the recovery of outstanding income tax. In its writ, the plaintiff cited one "Yong Siew Choon the Representative of the Estate of Abdul Hamid bin Tun Azmi" as the defendant. Yong Siew Choon is the widow of the deceased but has never been the executrix or administratrix of the deceased's estate as no letters of representation were ever extracted in respect thereof. The issue before the justices of appeal herein was whether the plaintiff's action against the deceased's estate could be maintained, considering the requirements of O. 15 r. 6A Rules of the High Court 1980 ('RHC') and the fact that no letters of representation were extracted.

Held:
Per Gopal Sri Ram JCA

[1] Although the plaintiff's action was commenced in accordance with the permissive provisions of O. 15 r. 6A(1) RHC, it was thereafter prosecuted in defiance of the mandatory provisions of O. 15 r. 6A(4) RHC. The non-compliance of O. 15 r. 6A(4) RHC was not a mere irregularity; it ran

counter to a point of substantive law, namely, that an action cannot be maintained against the estate of a deceased person in the absence of the extraction of letters of representation. Consequently, the plaintiff's action was an illegality and thus a nullity. (pp 112 e-h, 113 a, f-h & 114 a)

[Defendant's appeal allowed; plaintiff's action dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Kerajaan ('plaintif') telah memulakan suatu tuntutan terhadap pesaka Abdul Hamid bin Tun Azmi ('simati') bagi mendapatkan kembali bayaran cukai pendapatan yang tertunggak. Di dalam writnya, plaintif menamakan wakil kepada pesaka Abdul Hamid bin Tun Azmi, seorang Yong Siew Choon, sebagai defendan. Yoong Siew Choon adalah balu simati, namun beliau tidak pernah menjadi wasi atau pentadbir pesaka simati kerana tidak memperoleh apa-apa surat kuasa mentadbir bagi pesaka tersebut. Di hadapan hakim-hakim rayuan, isu yang timbul adalah sama ada tindakan plaintif di sini boleh dipertahankan, mengambilkira peruntukan A. 15 k. 6A Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') serta ketiadaan surat kuasa mentadbir berkenaan.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Walaupun tuntutan plaintif dibuat berlandaskan peruntukan biaran A. 15 k. 6A(1) KMT, ia kemudian diteruskan secara yang bertentangan dengan peruntukan mandatori A. 15 k. 6A(4) KMT. Ketidakpatuhan kepada A. 15 k. 6A(4) KMT bukanlah suatu perkara luar-aturan semata-mata; ia bercanggah dengan halperkara undang-undang substantif, iaitu, bahawa tiada tindakan boleh diambil terhadap sesuatu pesaka jika surat kuasa mentadbir berkenaannya tidak diperolehi. Tindakan plaintif dengan itu adalah tak sah dan batal.

[Rayuan defendan dibenarkan; tuntutan plaintif ditolak.]

Case(s) referred to:
Balachandran v. Chew Man Chan [1996] 1 CLJ 169 ***(foll)***
Chay Chong Hwa & Ors v. Seah Mary [1987] 1 MLJ 173 ***(foll)***
Chia Foon Sian & Anor v. Lam Chew Fah & Anor [1955] MLJ 203 ***(not foll)***
Chinese Tin Mines Rehabilitation Loans Board v. Chee Hoi Voon [1958] MLJ 269 ***(refd)***
Lee Lee Cheng v. Seow Peng Kwang [1960] MLJ 1 ***(refd)***
P Govindasamy Pillay v. Lok Seng Chai & Ors [1961] MLJ 89 ***(foll)***
Ruhani Mohat & Anor v. Abdul Karim Mat Ali & Anor [1993] 3 CLJ 524 ***(not foll)***

Savena Supramaniam Pillay v. Tan Kah Chiat (administrator of Tan Kong Liang deceased) [1934] MLJ 133 ***(refd)***

Shell Malaysia Trading Sdn Bhd v. Leong Yuet Yeng [1990] 3 MLJ 254 ***(refd)***

Singapore Gems Co v. The Personal Representatives for Akber Ali (deceased) [1992] 2 SLR 254 ***(foll)***

Wong Moy (administratrix of the estate of Theng Chee Khim, deceased) v. Soo Ah Choy [1996] 1 SLR 586 ***(foll)***

Legislation referred to:

Rules of the High Court 1980. O. 15 r. 6A(1), (4)

For the appellant/defendant - Jagjit Singh; M/s Jagjit Singh & Co

For the respondent/plaintiff - Abu Tariq Jamaluddin (Ahmad Ishak Mohd Hassan)

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S2-21-34-91]

Reported by Gan Peng Chiang

JUDGMENT

Gopal Sri Ram JCA:

This appeal raises a short but important point of procedure. It arises from an action brought by the respondent against the appellant for sums outstanding as income tax. The respondent's claim was based on a Notice of Assessment for the year 1989. The relevant notice is addressed to "Yong Siew Choon Wakil Sah Harta Pusaka Abdul Hamid bin Tun Azmi" which on a contextual translation reads "Yong Siew Choon the Representative of the Estate of Abdul Hamid bin Tun Azmi". It may here be mentioned that the appellant is the widow of Abdul Hamid bin Tun Azmi ("the deceased") but is neither the executrix nor the administratrix of the deceased's estate. Indeed, it is beyond dispute that no letters of representation of any sort were applied for or taken out in respect of the deceased's estate.

When the appellant failed to comply with the Notice of Assessment, the respondent issued a writ in which it cited the appellant again as "Yong Siew Choon Wakil Sah Harta Pusaka Abdul Hamid bin Tun Azmi", meaning, of course, that she was being sued as the representative of the deceased's estate. It is clear that the respondent obviously intended to implead the deceased's estate with a view to recovering the tax from it and not from the appellant personally.

Now, the institution of an action against the estate of a deceased person is governed by O. 15 r. 6A of the Rules of the High Court 1980 which reads as follows:

6A (1) Where any person against whom an action would have lain has died but the cause of action survives, the action may, if no grant of probate or administration has been made, be brought against the estate of the deceased.

(2) Without prejudice to the generality of paragraph (1), an action brought against 'the personal representatives of A. B. deceased' shall be treated, for the purposes of that paragraph, as having been brought against his estate.

(3) An action purporting to have been commenced against a person shall be treated, if he was dead at its commencement, as having been commenced against his estate in accordance with paragraph (1), whether or not a grant of probate or administration was made before its commencement.

(4) In any such action as is referred to in paragraph (1) or (3):

(a) the plaintiff shall, during the period of validity for service of the writ or originating summons, apply to the Court for an order appointing a person to represent the deceased's estate for the purpose of the proceedings or, if a grant of probate or administration has been made for an order that the personal representative of the deceased be made a party to the proceedings, and in either case for an order that the proceedings be carried on against the person appointed or, as the case may be, against the personal representative, as if he had been substituted for the estate;

(b) the Court may, at any stage of the proceedings and on such terms as it thinks just and either of its own motion or on application, make any such order as is mentioned in sub-paragraph (a) and allow such amendments (if any) to be made and make such other order as the Court thinks necessary in order to ensure that all matters in dispute in the proceedings may be effectually and completely determined and adjudicated upon.

(5) Before making an order under paragraph (4) the Court may require notice to be given to any insurer of the deceased who has an interest in the proceedings and to such (if any) of the persons having an interest in the estate as it thinks fit.

(5A) Where an order is made under paragraph (4) appointing the Official Administrator to represent the deceased's estate, the appointment shall be limited to his accepting service of the writ or originating summons by which the action was begun unless, either on making

such an order or on a subsequent application, the court, with the consent of the Official Administrator, directs that the appointment shall extend to taking further steps in the proceedings.

(6) Where an order is made under paragraph (4), rules 7 (4) and 8 (3) and (4) shall apply as if the order had been made under rule 7 on the application of the plaintiff.

(7) Where no grant of probate or administration has been made, any judgment or order given or made in the proceedings shall bind the estate to the same extent as it would have been bound if a grant had been made and a personal representative of the deceased had been a party to the proceedings.

We consider it useful to have regard to the previous position in order to properly appreciate the purpose and scope of r. 6A of O. 15. Prior to the introduction of the RHC 1980, the governing procedural law was housed within the Rules of the Supreme Court 1957 which contained no provision similar to O. 15 r. 6A. A plaintiff could not therefore commence an action against the estate of a deceased defendant until letters of representation were extracted.

In *P Govindasamy Pillay & Sons v. Lok Seng Chai & Ors* [1961] MLJ 89, the plaintiff sued the first and second defendants as administratrix and administrator respectively of the estate of one Goh Tiong Tan, deceased, *inter alia*, for damages for breach of contract. The defendants took the point that they had not been constituted the legal representatives of the deceased and could not be sued in that capacity so that the plaintiff's action was incompetent and ought to be dismissed *in limine*. Ismail Khan J (as he then was) when dismissing the action said:

> I respectfully follow Lord Parker's observations in the case of *Meyappa Chetty v. Supramanian Chetty* [1916] 1 AC 603 at p. 609 ... 'An administrator, on the other hand, derives title solely under his grant, and cannot, therefore, institute an action as administrator before he gets his grant'; in my opinion, this also applies in the reverse. The representative capacity can only be proved by the production of the grant under seal or a certified copy thereof.
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> In my opinion, it is only on extracting the grant of letters of administration that the petitioner can be said to be duly clothed with a representative character and to have acquired a title to the estate. I am fortified in this view by the judgment of Scott LJ in *Ingall v. Moran* [1944] KB 160; [1944] 1 All ER 97 at p. 164. In that case the plaintiff issued a writ in an action brought by him under the Law Reform (Miscellaneous Provisions) Act 1934. He purported to sue in a representative capacity as administrator of his son's estate. The writ was issued in September 1942, but the grant of letters of administration was not taken out until November. Scott LJ in his judgment

> observed that 'at the time the writ issued the plaintiff had no shadow of title to his son's surviving chose in action, in respect of which he purported to issue a writ … The defendant could have demanded production of the non-existent letters of administration, and on the plaintiff's failure to produce them the action would, on the defendant's application, automatically have been struck out.' It was held in that case that as no letters of administration were taken out at the date of the writ, the writ was a nullity from the beginning and that the subsequent grant of letters of administration did not operate retrospectively so as to validate the action.

While on the topic, we note that Whitton J in *Chia Foon Sian & Anor v. Lam Chew Fah & Anor* [1955] MLJ 203 held that it is the order of the registrar granting letters of administration and not their extraction that confers authority upon an administrator. A similar view was expressed in the case of *Ruhani binti Mohat & Anor. v. Abdul Karim Mat Ali & Anor.* [1993] 3 CLJ 524. However, as may be seen, Ismail Khan J in *P Govindasamy Pillay & Sons v. Lok Seng Chai & Ors (supra)* declined to follow Whitton J's view. The courts of Singapore have preferred *Govindasamy Pillay*'s case to that of *Chia Foon Sian (supra).*

In *Singapore Gems Co v. The Personal Representatives for Akber Ali (deceased)* [1992] 2 SLR 254, Chao Hick Tin J (now a Judge of the Court of Appeal) whose views are entitled to much respect held that:

> While the Malaysian authorities are not binding on me and are only of persuasive authority, I accepted the reasoning of Ismail Khan J in Govindasamy Pillay, that an administrator has not clothed himself with that status until he has extracted the grant. It seemed clear to me that what was stated by Whitton J in Chia Foon Sian, was just obiter, as the real issue in that case concerned the validation of payments made to an executor de son tort who later was appointed administrator.

In *Wong Moy (administratrix of the estate of Theng Chee Khim, deceased) v. Soo Ah Choy* [1996] 1 SLR 586, Judith Prakash J agreed with the judgment of Chao Hick Tin J in the Singapore Gems Co case. Her Honour also referred to the Privy Council decision in *Chay Chong Hwa & Ors v. Seah Mary* [1987] 1 MLJ 173. The advice of Lord Oliver of Aylmerton in that case, when properly interpreted, makes it amply clear that Ismail Khan J's decision in *Govindasamy Pillay*'s case *(supra)* is correct and that any contrary view is erroneous. Decisions that express such contrary view are in our judgment wrongly decided and ought not to be followed.

Now the result of the law as expressed in *Govindasamy Pillay*'s case though accurate, often produced much injustice, especially in road accident cases because of s. 8(3)(b) of the Civil Law Act 1956 which provides:

> No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person, unless proceedings against him in respect of that cause of action …
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> …
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> (b) are taken not later than six months after his personal representative took out representation.

The point we seek to make is well illustrated by *Lee Lee Cheng v. Seow Peng Kwang* [1960] MLJ 1. In that case, a passenger in a motor-car which was being driven by one Loke collided with a motor lorry. Both men were killed. The passenger's widow brought an action against the administrator of the estate of Loke more than six months after the letters of administration were extracted. It was held (by Syed Sheh Barakhbah J [1958] MLJ 271 and the Court of Appeal of Malaya) that the action was time barred and that the court had no power to extend time. We would observe that had there been a rule of court in terms of O. 15 r. 6A, the plaintiff in that case could have commenced her action well within the time limited by statute.

Returning to the present case, we would observe that the respondent was perfectly entitled (by reason of O. 15 r. 6A) to commence the action in the manner intituled. But having done so, it did nothing else save to prosecute the action to judgment. In other words, there was blatant non-compliance with O. 15 r. 6A(4).

It is our judgment that while O. 15 r. 6A is a remedial provision of adjectival law, it is important that a litigant who seeks to take advantage of it must comply with its terms before he or she may take advantage of any provision of substantive law. See, *Balachandran v. Chew Man Chan* [1996] 1 CLJ 169, per Vincent Ng J; *Singapore Gems Co v. The Personal Representatives for Akber Ali (deceased) (supra)*. Non-compliance therefore renders the action more than a mere irregularity. The entire action is badly constituted as a matter of substantive law. For, it is only in an action against the duly appointed legal representative of the estate of a deceased that a judgment may be obtained that may be enforced against the assets of the estate. That is why O. 15 r. 6A(7) makes it abundantly clear that if the terms of O. 15 r. 6A are complied with then an order or a judgment obtained in the action shall bind the estate of a deceased person. Conversely, therefore, if the provisions of O. 15 r. 6A are not complied with then any order or judgment is useless as it would be wholly unenforceable against the estate of the deceased.

It is also important to bear in mind that the judgment that is extracted in an action against the estate of a deceased defendant must, if it is to be capable of being executed against the assets of the estate be in the form de bonis testatoris. If it is merely in the form *de bonis propriis*, then it cannot be executed against the assets of the deceased's estate.

In *Savena Supramaniam Pillay v. Tan Kah Chiat administrator of Tan Kong Liang deceased* [1934] MLJ 133 the headnote reports that the court held that "when an action is brought against an administrator and judgment is entered against the defendant simpliciter, this is a judgment *de bonis propriis* and does not entitle the judgment creditor to obtain satisfaction out of the assets of the deceased". That case was followed by Syed Sheh Barakbah J (later Lord President) in *Chinese Tin Mines Rehabilitation Loans Board v. Chee Hoi Voon* [1958] MLJ 269 and both these cases were followed and applied by Gunn Chit Tuan J (later Chief Justice of Malaya) in *Shell Malaysia Trading Sdn Bhd v. Leong Yuet Yeng* [1990] 3 MLJ 254. All these cases concerned judgments in default, either of appearance or of defence. But we do not see that that makes any difference to the cardinal principle, namely, that it is only a judgment de bonis testatoris that will bind the estate of a deceased. We may also add that in *Chinese Tin Mines Rehabilitation Loans Board v. Chee Hoi Voon* it was held that (to quote the headnote to the report of that case): "judgment having been obtained against an administrator of an estate *de bonis propriis* on a loan made to him in his representative capacity, a second action does not lie against him in his personal capacity for the balance due on the unsatisfied judgment or on the former cause of action. The previous judgment is still outstanding and the proper remedy is to execute the judgment."

In the present case, the action was commenced in accordance with the permissive provision in O. 15 r. 6A(1). But it was prosecuted in defiance of the mandatory provisions of O. 15 r. 6A(4) which is the only provision that enables an action to be kept on foot. So, non-compliance of O. 15 r. 6A(4) is not a mere irregularity, it runs counter to a point of substantive law, namely, that an action cannot be maintained against the estate of a deceased person in the absence of the extraction of letters of representation. It follows that the respondent's suit in the present instance is an illegality and therefore a nullity.

To summarise, the rule of substantive law is that an action may be commenced and maintained by or against the estate of a deceased after, and only after, letters of representation have been extracted. Order 15 r. 6A provides a very limited exception to that substantive rule by permitting the commencement of an action against the estate of a deceased even before the extraction of letters of representation. But it regulates the future prosecution of the action by requiring (in r. 6A(4)) certain steps to be taken in that respect and specifying

the time limited for the taking of such steps. Failure to observe the terms of r. 6A(4) of O. 15 will therefore deprive a plaintiff of the beneficial effect of r. 6A and thereby activate the principal rule of substantive law governing such actions so as to render the action already commenced a nullity. As already stated in the preceding paragraph of this judgment that is what happened in the present case.

The appeal is accordingly allowed. The order of the High Court is set aside. The plaintiff's action is dismissed with costs both in this court and in the court below. The deposit is to be refunded to the appellant.